

Reply Brief on Appeal Under 37 C.F.R. §
41.41
In re Appl. No. 10/775,746

PATENT
Attorney Docket No. P2702US

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

In re Application of:
Cox et al.

Art Unit: 3677

Application No. 10/775,746

Examiner: William L. Miller

Filed: February 10, 2004
For: METHOD FOR CUSTOMIZING
A BURIAL VAULT CARAPACE

Confirmation No.: 1553

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, Virginia 22313-1450

APPELLANTS' REPLY BRIEF ON APPEAL UNDER 37 C.F.R. § 41.41
(SUBSTITUTE APPEAL BRIEF)

Dear Sir:

In accordance with the provisions of 37 C.F.R. § 41.41, Appellants submit this Reply Brief in response to the Examiner's Answer for the above-identified application, mailed September 30, 2009. This Reply Brief is a substitute brief that replaces the original brief and responds to issues that were newly raised in the Examiner's Answer.

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TABLE OF CASES CITED

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I. REAL PARTY IN INTEREST

The real parties in interest in this appeal are the assignees, Christie M. Cox and Marty Jay Cox, by virtue of the Assignment recorded in the U.S. Patent and Trademark Office on February 10, 2004, at reel/frame 014983/0096.

II. RELATED APPEALS AND INTERFERENCES

There are no related appeals and no related interferences known to Appellants, Appellants' assignees, or Appellants' legal representatives.

III. STATUS OF CLAIMS

Claims 1, 3, 4, 6, 16-18 and 20-25 are pending in the application. Claims 2, 5 and 7-15 were canceled. Claim 19 was withdrawn as being directed to a non-elected species.

Claims 1, 3, 4, 6, 16-18 and 20-25 were rejected under 35 U.S.C. § 103(a) as being obvious over U.S. Patent Publication No. 2003/0167706 (“Pazar”) in view of U.S. Patent No. 4,219,596 (“Takemoto”). Claims 1, 3, 4, 6, 16-18 and 20-25 are on appeal.

IV. STATUS OF AMENDMENTS

All amendments have been entered in this application.

V. SUMMARY OF THE CLAIMED SUBJECT MATTER

Claims 1, 16 and 17 are the pending independent claims that are the subject of this appeal. Claims 3, 4 and 6 are also pending and either directly or indirectly depend from independent Claim 1. Claim 20-25 are also pending and depend either directly or indirectly from independent Claim 17. In addition, Claim 18 is pending and depends directly from independent Claim 17.

Claim 1 recites a decorative carapace for a burial vault (Page 4:9-20; Figure 1A, Element 22). The carapace has a top surface and a substrate attached to the top surface (Page 5:1-2; Figure 1A, Elements 10 and 20). The substrate is formed from a material that includes a polyester, polypropylene, polyethylene, vinyl, acetate, acrylic, polystyrene or polycarbonate (Page 5:20–6:6; Figure 1D, Element 25). An adhesive is interposed between the carapace and the substrate and adheres the substrate to the carapace (Page 6:7-13; Page 8:6-13; Figure 1D, Element 25). The substrate includes a decorative graphic (Page 5:8-16, Figures 1B and 1C).

Claim 16 recites a decorative receptacle for holding the remains of a deceased, which includes a container (Page 4:9-20; Figure 1A, Element 22). The decorative receptacle also includes a substrate and an adhesive attaching one side of the substrate to a surface of the container (Page 5:1-2; Page 6:7-13; Figures 1A and 1B, Elements 10, 20 and 25). The other side of the substrate includes a graphic image (Page 5:8-16, Figures 1B and 1C). The substrate is either: flexible (Page 6:3-6); substantially transparent along with the adhesive being substantially transparent (Page 6:7-10); or formed from polyester, polypropylene, polyethylene, acetate, acrylic, polystyrene or polycarbonate (Page 6:1-5).

Claim 17 recites a decorative receptacle for holding the remains of a deceased, which includes a container (Page 4:9-20; Figure 1A, Element 22). The decorative receptacle also includes a substrate and an adhesive attaching one side of the substrate to a surface of the container (Page 5:1-2; Page 6:7-13; Figures 1A and 1B, Elements 10, 20 and 25). The other side of the substrate includes a graphic image (Page 5:8-16, Figures 1B and 1C). The substrate substantially covers the surface of the container to which it is attached (Page 5:5-7; Page 5:20-21).

VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

The issues on appeal are as follows:

1. Whether the commercial success achieved by Appellants' invention as claimed by independent Claims 1, 16 and 17 of the Present Application demonstrates that Appellants' invention is not obvious over Pazar (U.S. Patent Publication No. 2003/0167706) in view of Takemoto (U.S. Patent No. 4,219,596).

2. Whether one of ordinary skill in the art would seek to combine Pazar (U.S. Patent Publication No. 2003/0167706) with Takemoto (U.S. Patent No. 4,219,596) to arrive at the invention claimed by independent Claims 1, 16 and 17 of the Present Application.

VII. ARGUMENT

A. The Commercial Success Achieved by the Invention Claimed by Independent Claims 1, 16 and 17 Demonstrates that the Claimed Invention is Not Obvious

The Declaration of Marty Jay Cox with supporting exhibits attached as **Appendix B** demonstrates the non-obviousness of the present invention by its commercial success.

Paragraph Nos. 8–15 of the Declaration provide the best evidence available to the Appellants as to gross market sales figures. This evidence shows that despite an overall trend resulting in more cremations and a decreasing demand for burial vaults, the percent of market share with respect to Appellants' invention, as claimed, has steadily increased over the years.

Furthermore, as indicated in the Declaration, no solution to increasing the desirability of burial vaults to consumers according to the presently claimed invention existed in the marketplace prior to the Appellants showing the invention, as claimed, at a trade show — however, in the immediate year following this showing, there was an explosion among competitors in the marketplace for products precisely in line with what was shown at the trade show and what was claimed in the present patent application.

1. Examiner's Position

The Examiner indicated that the Declaration of Marty Cox was insufficient to overcome the 35 U.S.C. § 103 rejection simply because:

The provided gross sales figures and evidence as to market share is insufficient to effectively establish commercial success as there is no means (data) to evaluate the increase in market share versus the industry, such as expected sales data.

Final Office Action of April 13, 2009, Paragraph 18.

2. Appellants' Position

The Examiner incorrectly states the showing requirements for the Declaration filed under 37 C.F.R. § 1.132. Based on the decision of Board of Patent Appeals and Interferences in *Ex Parte Standish*, 10 USPQ2d 1454 (Bd. Pat. App. & Inter. 1988), MPEP § 716.03(b)(IV) states:

IV. SALES FIGURES MUST BE ADEQUATELY DEFINED

Gross sales figures do not show commercial success absent evidence as to market share, *Cable Electric Products, Inc. v. Genmark, Inc.*, 770 F.2d 1015, 226 USPQ 881 (Fed. Cir. 1985), or as to the time period during which the product was sold, or as to what sales would normally be expected in the market, *Ex Parte Standish*, 10 USPQ2d 1454 (Bd. Pat. App. & Inter. 1988).

MPEP § 716.03(b)(IV) (emphasis added).

Thus, although this section clearly indicates that mere gross sales figures are inadequate to show commercial success, there are three evidentiary *alternative* mechanisms for remedying this: (a) providing evidence of market share; (b) providing evidence as to the time period during which the product was sold; *or* (c) providing evidence as to what sales would normally be expected in the market.

In fact, *Ex Parte Standish* further elaborates on the statements cited in the MPEP:

However, the only evidence of record concerning commercial success comprises a statement by the inventor in the § 1.131 affidavit that more than 5,000 lures “constructed according to the disclosure and claims of my patent application” have been sold. The affidavit statement does not reflect the time period during which the lures were sold or the average number of product sales per unit of time which would normally be expected in the market place under consideration. Accordingly, we cannot determine whether appellant's lure, in fact, has been commercially successful. [emphasis added]

Ex Parte Standish at 1458 (emphasis added).

Thus, alternative (c) would be an option for one to provide commercial success evidence beyond mere gross sales figures if he did not have available the overall industry-

wide sales from which market share information would necessarily be derived. However, if he had available (as Appellants have here) reasonably accurate estimates of actual sales in the marketplace, then the expected sales in the marketplace is rendered moot.

In the present case, Appellants do have a good indication of overall actual market sales, and are thus able to sufficiently demonstrate an increasing market share based thereon, as provided under alternative (a) — this demonstration under alternative (a) is sufficient to adequately define the sales figures that demonstrate commercial success by an increasing market share. The Declaration shows not only an increase in market sales between the years of 2003–2006, but also a percentage increase in market sales (as required for a proper showing), this despite an overall decline of sales in the marketplace.

In the alternative, Appellants argue that the evidence of actual sales in the marketplace serve as an adequate proxy as to what expected sales in the marketplace would be (in proportion to Appellants' previous market share) and therefore do constitute the type of evidence the Examiner indicates is lacking in the Declaration. The Examiner has indicated the evidence provides no data to evaluate the increase in market share, when in fact the submitted evidence shows precisely that. Thus, the Examiner is in error in asserting that the Declaration and its supporting exhibits does not provide evidence of non-obviousness in accordance with the criterion established in *Graham v. John Deere Co.*, 383 U.S. 1 (1966).

3. Examiner's Answer Position

The Examiner stated, in the Examiner's Answer, on p. 6, that the Appellants' showing of an increase in sales and market share, despite a decreasing demand for burial vaults, is insufficient to establish commercial success. The Examiner asserted that the Appellants have failed to establish a nexus between the claimed features of the invention and the commercial success as required per MPEP § 716.03(a)–(b). The Examiner noted that success must be linked to the claimed invention and not to some extraneous factor, such as advertising, brand name recognition, or market share. The Examiner stated that a mere showing of commercial success of an article which embodied the invention is not sufficient and that the Appellants' increase in sales may have resulted from extraneous

factors such as a reduction in cost per unit, a reduction in quantity of other products offered for sale by the appellant and/or competitors, and/or advertising methods.

4. Appellants' Reply Position

MPEP § 716.03(b) reproduces a quote from *Demaco Corp. v. F. Von Langsdorff Licensing Ltd.*, 851 F.2d 1387, 7 USPQ2d 1222 (Fed. Cir. 1988), "A requirement for proof of the negative of all imaginable contributing factors would be unfairly burdensome, and contrary to the ordinary rules of evidence."

Appellants did adequately establish, pursuant to MPEP § 716.03(b)(IV) and cited appertaining case law, evidence of as to market share in addition to gross sales figures, which establishes an increasing market share, and in fact, an overall increase in sales of the relevant units. This provides a degree of nexus between the claimed invention and the commercial success, which should be fairly weighed. While Appellants have not provided proof of the negative of all imaginable contributing factors of commercial success in the Affidavit, Appellants respectfully assert that to do so would be unfairly burdensome, and contrary to the ordinary rules of evidence.

B. A Person of Ordinary Skill in the Art Would Not Seek to Combine Pazar with Takemoto to Arrive at the Invention Claimed by Independent Claims 1, 16 and 17 of the Present Application

1. Examiner's Position

In the Final Office Action of April 13, 2009, the Examiner asserted that the combination of Pazar and Takemoto rendered the independent claims (and others) obvious.

In reading the Pazar reference onto claim 1, the Examiner stated that:

Pazar discloses a decorative carapace for a burial vault comprising: a carapace 2910 (Fig. 28) having a top surface; and a metal substrate (nameplate) 2310 having a decorative graphic (name and date) and being attached/adhered to the top surface via screws.

Final Office Action of April 13, 2009, Paragraph 4.

The Examiner stated that Pazar fails to disclose the substrate as being a transparent substrate having a decorative graphic printed therein wherein the substrate is attached to the carapace via a transparent adhesive. The Examiner then provided the Takemoto reference as disclosing:

[A] decorative assembly comprising a transparent substrate 16 having a decorative graphic 18 printed therein wherein the substrate is attached to a structure via a transparent adhesive (col. 3, lines 59-60) such that the graphic appears to be part of the structure as opposed to appearing “stuck on” (col. 3, lines 57-62).

Final Office Action of April 13, 2009, Paragraph 5.

As for the motivation to combine, the Examiner provided:

[I]t would have been obvious [] to modify Pazar by replacing the metal substrate with a transparent substrate having a decorative graphic printed thereon wherein the substrate was attached to the carapace via a transparent adhesive.

Final Office Action of April 13, 2009, Paragraph 5.

The Examiner then relied upon *KSR*’s rationale relating to a simple substitution of one known element for another to obtain predictable results, noting:

The substitution of the metal substrate with a transparent substrate having a decorative graphic printed thereon wherein the substrate was attached to the carapace via a transparent adhesive would improve the appearance of the vault as the graphic would appear to be part of the structure.

Final Office Action of April 13, 2009, Paragraph 5.

The Examiner characterized the substitution as the mere replacing of one known display substrate (Pazar’s metal substrate with graphics) with another known display substrate (Takemoto’s transparent substrate with graphics). Final Office Action of April 13, 2009, Paragraph 15.

2. *Appellants’ Position*

The Examiner has suggested that one of ordinary skill in the art would simply combine one metallic decorative nameplate (Pazar) with another transparent substrate

with graphics (Takemoto) to arrive at the invention claimed by Claims 1, 16 and 17 of the Present Application. However, the Examiner has misconstrued the motivation to combine the Pazar and Takemoto references. MPEP § 2143.01(VI) provides that a proposed modification cannot change the principle of operation of a reference.

In Pazar, the metal nameplate is used for identification purposes, and is intended to be made in a very durable manner. Although Pazar is referring to the aspects of the invention in general, it states at [0009], “[t]his information is provided by archival quality materials that resist wear by the elements and are reliably and easily accessed a century or more after burial without opening the vault.” Thus, the principle of operation in Pazar is a very durable and very easily readable element to permit ease of identification after being buried a century or more. Furthermore, Appellants argue in addition that a metallic name plate in and of itself, and certainly that disclosed in Figure 23 of Pazar, would not be considered by one of ordinary skill in the art as “decorative”.

The aims of Pazar are at odds with using a decorative plastic, as provided by Takemoto. First, plastic materials would not provide the kind of durability that is central to the principle of operation of the nameplate in Pazar. One seeking to establish durability for identification by future generations would not consider plastic as a solution of durability in view of other significantly more durable materials, such as metal. Secondly to the extent that readability is important, one would further not consider the use of a plastic as being superior in readability to an identification provided on an opaque plate of metal. One would be changing the principle of operation of Pazar (durability, readability) to incorporate the teaching of Takemoto in order to arrive at the present invention. Thus, one of skill in the art would not find a motivation, either within or external to the references, to combine the teaching of Takemoto with that of Pazar to arrive at the present invention.

Furthermore, the problem addressed by the invention is how to increase the commercial desirability of burial vaults, particularly given the fact that the burial vault is not typically used in a funeral service or public viewing other than the brief services that typically accompany the burial graveside.

The Examiner indicated that the substitution of the decorative graphic for the metal plate of Pazar would obtain predictable results — namely, improving the appearance of the carapace. However, the Examiner misstates and oversimplifies the nature of the predictable results; it is not the mere improvement of the appearance of the carapace, it is that a particular type of improvement of the appearance of the carapace (out of many different possible types of appearance improvement) would result in an overall commercial desirability of burial vaults. This is contrary to what one of ordinary skill in the art would conclude given, as mentioned above, that the burial vault is not typically used in a funeral service or public viewing other than the brief services that typically accompany the burial graveside. Appellants' Declaration, which is discussed in more detail below, clearly indicates a commercial success and copying by others that would make this realization non-obvious.

In addition to what was discussed in the prior response, Appellants respectfully assert that the Examiner has not considered “the invention as a whole”, as required under MPEP § 2141.02(I) (and supporting case law) — it is not a question of whether the differences themselves would have been obvious, but whether the claimed invention as a whole would have been obvious. Furthermore, as provided under MPEP § 2141.02(III) (and supporting case law), discovering the source/cause of a problem is part of the “as a whole” inquiry. The Appellants have recognized, out of various potential ways to improve the commercial desirability of a burial vault, that an applied graphic image, as claimed, would improve the commercial desirability of a burial vault, even when the burial vault is not typically used in a funeral service or public viewing other than the brief services that typically accompany the burial graveside. It is this aspect that has been ignored by the Examiner. The inclusion of a decorative graphic on a cinder block intended for an unviewable internal wall of a building would very likely not increase its commercial desirability, although, based on the Examiner's argument, would improve the appearance of the cinder block — clearly, this is not the issue.

Pazar recognized that providing durable identification and data about the deceased in connection with the burial vault would improve its desirability (see Paragraph [0008]). Pazar achieves this by two mechanisms — as to the data about the deceased, a durable

and sealed record receptacle 140 is provided that can contain a written record provided by friends and family of the deceased. This small record receptacle is designed to be placed in a receiving hole of the burial vault and sealed, where its contents are relatively immune from the elements. As to durable identification, Pazar achieves this by a name plate 2310 made of metal [0084] adhered to the lid.

Therefore, Pazar recognized one of many ways for improving the desirability of a burial vault, namely by enhancing a preservation of the identity and information associated with the deceased. In the event that, e.g., a flood carries away the burial vault, the problems associated with identifying its contents can be avoided [0002]. However, this solution is not an appearance-related solution.

There are numerous other potential mechanisms that could be used to enhance the desirability of a burial vault. A brief and informal survey of the industry indicates that other non-appearance-related solutions have been implemented, such as strength, integrity, protection from the environment, materials, etc. And for those few mechanisms that could conceivably be appearance-related, these seem to revolve around cross-sectional shapes, molding, and characteristics of the materials used.

In the Present Application, the Appellants recognized a solution to improving the desirability of a burial vault that had not been recognized before — the addition of a graphic label to enhance the overall desirability of the burial vault by visual means that does not involve cross-sectional shapes, moldings, etc. This solution had not been recognized in the industry previously.

In Pazar, the issue being addressed is the durability of identifying indicia. Therefore, it would make sense in Pazar to construct the identifying indicia name plate of a very durable material — namely metal. The attributes of the substrate in claim 1 are not those that one of ordinary skill in the art would turn to if the issue of durability was of primary concern, as the metal nameplate of Pazar would much better serve as a durable identifying indicia. Therefore, one of ordinary skill in the art would not consider the teaching of Pazar in improving the desirability of a burial vault as is achieved in present claim 1 by providing durable identifying and describing indicia in the form of a metal

nameplate and environmentally sealed data capsule, and would not have a motivation to consider the use of the labels disclosed by Takemoto if such durability were a concern.

The attributes of the substrate of Claim 16 are not those that one of ordinary skill in the art would turn to if the issue of durability was of primary concern, as the metal nameplate of Pazar would much better serve as a durable identifying indicia. Therefore, one of ordinary skill in the art would not consider the teaching of Pazar in improving the desirability of a burial vault by providing durable identifying and describing indicia particularly illuminating with regard to the present invention, as discussed above.

Similarly, with regard to Claim 17, the substrate covers substantially the first surface of the container. One concerned with providing a desirable burial vault as presently claimed by Claim 17 would not turn to the durable identifying indicia disclosed by Pazar since it would make no sense to provide a nameplate that covers substantially the first surface of the container. Secondly, even if such a large nameplate were desirable, then its construction out of a durable metal would make it cost prohibitive, at least in a commercially viable marketplace.

In the present Office Action, the Examiner has engaged in impermissible hindsight in combining the references of Pazar and Takemoto. The Examiner has used the Appellants own disclosure as providing the motivation and desirability for providing combining the references to arrive at the presently claimed solution. Out of the myriad of possible ways of improving the desirability of a burial vault, numerous other mechanisms have been employed (durability of identifying indicia, structural aspects, moldings, etc.), but no one recognized that providing a graphical label, as presently claimed, would achieve the improvement of desirability presently achieved.

As prohibited by MPEP § 2145(X)(A), the Examiner, having taken the cue from the Appellant's disclosure that the addition of a graphic label having the claimed attributes is a solution for making a burial vault more desirable, then, simply in hindsight, located the Takemoto reference showing such a label, and concluded that this would have been an obvious combination. It was unknown, at the time the invention was made, that the addition of a graphic image having the claimed features would result in a more commercially desirable burial vault, and one at the time of the invention could have

determined that such a feature was actually undesirable or, at the very least, unnecessary, and therefore, cost prohibitive or lacking in commercial common sense.

As noted by MPEP § 2143.01(III), the mere fact that the references can be combined or modified may not be sufficient to establish *prima facie* obviousness. Here, the Examiner has simply pointed to two references that teach differing aspects, differing applications, and different motivations for use and concluded that one of ordinary skill in the art would be motivated to combine them. Again, however, this is only after the solution of applying a graphic in accordance with the disclosure of the invention was taught by the Appellants. The motivation cited by the Examiner “to enhance the appearance of the vault” and “the transparent substrate of Takemoto is a more visual[ly] appealing arrangement than that of the metal substrate of Pazar” fails to take into account the many possible ways for enhancing the commercial desirability of the vault, the other ways historically used to enhance the desirability and appearance of the burial vault, and the fact that Pazar’s motivation includes durability for identification purposes.

Thus, for these reasons, Appellants respectfully assert that the independent Claims 1, 16 and 17 of the Present Application and the claims that directly or indirectly depend from independent Claims 1, 16 and 17 are not obvious over the combination of Pazar and Takemoto.

3. Examiner’s Answer Position

The Examiner stated, in the Examiner’s Answer, on pp. 6–7, that the Appellants have provided no evidence to support the argument of metal being more durable than plastic for a carapace nameplate. The Examiner then noted that plastic would outperform metal due to its resistance to corrosion—a significant factor for a buried article.

On p. 8, the Examiner indicated that the Appellants argue that the attributes of the claimed substrate are not those that one of ordinary skill in the art would turn to if the issue of durability was of primary concern and therefore one of ordinary skill in the art would not consider the teaching of Pazar in improving the desirability of a burial vault. The Examiner suggested that the argument is inaccurate since Pazar is used as a base reference to establish that it is known to decorate a carapace via a metal nameplate (metal

substrate with indicia) secured thereto, and that Takemoto is applied as the teaching reference to improve the Pazar carapace by replacing the metal nameplate (metal substrate with indicia) with a more visually appealing transparent, plastic substrate with indicia as previously discussed. The Examiner reasoned that the plastic material would be an improvement, not a reduction, in durability with respect to corrosion resistance.

The Examiner further indicated that, regarding claim 17, the Appellants argued that it makes no sense to provide a nameplate in Pazar that covers substantially the first surface of the container. The Examiner disagreed because a change in size of the nameplate would be an obvious design consideration and would inherently translate to an option for an increase in the indicia.

4. *Appellants' Reply Position*

Appellants do not disagree with the Examiner's statement that Appellants provided no evidence to support that metal is more durable than plastic. However, Appellants respectfully assert that the Examiner's position that plastic is more durable than metal is similarly devoid of evidentiary support, and the mere identification of corrosion as a destructive factor for metal does not establish that a breakdown of plastics according to some other factor does not occur more rapidly.

However, Appellants do not need to assert whether their or the Examiner's evidence-lacking positions on durability is the proper one that the Board should consider. Presuming, *arguendo*, that the Examiner is correct and that plastic is more durable than metal, then this is an admission by the Examiner of non-obviousness in the use of plastic for a burial vault.

Pazar is concerned with providing identifying indicia in the event that a burial vault is washed away by a flood and away from other means of identifying the vault occupant. Pazar deals with this problem by providing a nameplate that serves as an identifying indicia on the vault. It would be highly desirable by Pazar to use a material having a maximum longevity to maximize the length of time in the future that the plate could still serve as an identifying indicia for the vault occupant. Plastic was clearly known at the time of the March 8, 2002, filing date of the Pazar application. If Pazar was

concerned about maximizing longevity, and if plastic is known to have a greater lifetime in the earth than metal, then Pazar would have suggested the use of plastic if it plastic is an obviously more durable material. Presuming the Examiner's position for the sake of argument, Pazar's lack of consideration of a well-known and more durable material that meets Pazar's aim of providing a maximally durable identifier therefore strongly suggests that the use of plastic on a burial vault is non-obvious.

If, on the other hand, plastic is less durable than metal, then it would be highly undesirable to use plastic as the substrate for an identifying indicia given the aims of Pazar (to maximize the longevity of the identifying indicia). MPEP § 2143.01(V), and supporting case law, clearly states that a proposed modification cannot render the prior art unsatisfactory for its intended purpose. Although clearly a matter of degree, the application of Takemoto's less desirable and less durable disclosure of plastic would render the nameplate of Pazar unsatisfactory for its intended purpose of providing a long-life identifying indicia for the person in the burial vault.

For the reasons discussed above, either determination of durability supports the non-obviousness of using plastic on a burial vault in light of the prior art.

VIII. CONCLUSION

For the foregoing reasons, Appellants respectfully submit that the Examiner is in error in law and in fact in rejecting Claims 1, 3, 4, 6, 16-18 and 20-25 based on the teachings of the above-discussed references. Accordingly, reversal of the rejection of all of those claims is respectfully requested.

Respectfully submitted,

/mark bergner/

Brian C. Rupp, Reg. No. 35,665
Mark Bergner, Reg. No. 45,877
Jasmine R. Patel, Reg. No. 59,344
DRINKER BIDDLE & REATH LLP
191 N. Wacker Drive, Suite 3700
Chicago, Illinois 60606-1698
(312) 569-1000 (telephone)
(312) 569-3000 (facsimile)
Customer No.: 08968

Date: November 30, 2009

APPENDIX A
CLAIMS INVOLVED IN THE APPEAL

Claim 1 (previously presented): A decorative carapace for a burial vault comprising:
a carapace having a top surface; and
a substrate, having a decorative graphic, said substrate being attached to said top surface of said carapace; and
adhesive interposed between said carapace and said substrate, and adhering said substrate to said carapace;
wherein said substrate is formed from a material selected from the group of polyester, polypropylene, polyethylene, vinyl, acetate, acrylic, polystyrene, or polycarbonate.

Claim 2 (canceled).

Claim 3 (original): The decorative carapace according to claim 1 wherein said substrate is transparent.

Claim 4 (original): The decorative carapace according to claim 1 wherein said graphic is printed on said substrate.

Claim 5 (canceled).

Claim 6 (original): The decorative carapace according to claim 4 wherein said substrate is adhered to said carapace using transparent adhesive.

Claims 7–15 (canceled).

Claim 16 (previously presented): A decorative receptacle for holding the remains of a deceased, the receptacle comprising:

- a container;
- a substrate having first and second sides;
- a graphic image applied to the first side of the substrate; and
- an adhesive attaching the second side of the substrate to a first surface of the container;

wherein at least one condition from the following group is met:

- a) the substrate is formed from a material selected from the group of polyester, polypropylene, polyethylene, vinyl, acetate, acrylic, polystyrene, or polycarbonate;
- b) the substrate is flexible; and
- c) the substrate is substantially transparent and the adhesive is substantially transparent.

Claim 17 (previously presented): A decorative receptacle for holding the remains of a deceased, the receptacle comprising:

- a container;
- a substrate having first and second sides;
- a graphic image applied to the first side of the substrate; and
- an adhesive attaching the second side of the substrate to a first surface of the container;

wherein the substrate substantially covers the first surface of the container.

Claim 18 (previously presented): The device of claim 17, wherein the container comprises a burial vault.

Claim 19 (withdrawn): The device of claim 16, wherein the substrate is flexible and the container comprises an urn.

Claim 20 (previously presented): The device of claim 16, wherein the substrate is substantially transparent and the adhesive is substantially transparent.

Claim 21 (previously presented): The device of claim 16, wherein the graphic image comprises a color image.

Claim 22 (previously presented): The device of claim 21, wherein the graphic image is printed on the first side of the substrate.

Claim 23 (previously presented): The device of claim 16, wherein the substrate comprises a continuous sheet of material without seams.

Claim 24 (previously presented): The device of claim 16, wherein the substrate is substantially rigid.

Claim 25 (previously presented): The device of claim 16 further comprising a protective layer covering the graphic image.

APPENDIX B
EVIDENCE APPENDIX

As evidence in support of this appeal, Appellants hereby include the declaration of Marty Jay Cox with supporting Exhibits pursuant to 37 C.F.R. § 1.132. An executed copy of this declaration with supporting Exhibits was originally entered in the record as Appendix B to Appellants' Response to the Office Action of February 8, 2008, and is hereby attached to this appendix as **Attachment 1**. As described in the Response to the Office Action of February 8, 2008, the copy of the declaration attached herein as Attachment 1, for reasons that are unclear, lost the paragraph numbering during the process of electronic transmission between the Appellants' representative and Mr. Cox. Therefore, an unsigned copy of the declaration, which is identical to the executed version with the exception that it includes the properly numbered paragraphs, which was originally entered in the record as Appendix C to Appellants' Response to the Office Action of February 8, 2008, is hereby attached this appendix as **Attachment 2** for ease of reference.

Reply Brief on Appeal Under 37 C.F.R. §
41.41
In re Appl. No. 10/775,746

PATENT
Attorney Docket No. P2702US

APPENDIX B – ATTACHMENT 1

**EXECUTED DECLARATION/AFFIDAVIT UNDER 37 C.F.R. § 1.132
WITH SUPPORTING EXHIBITS**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

APPLICANT(S):	Cox et al.	DOCKET NO:	P2702US
SERIAL NO.:	10/775,746	ART UNIT:	3677
FILED:	February 10, 2004	EXAMINER:	William L. Miller
CONF. NO.:	1553		
TITLE:			Method for Customizing a Burial Vault Carapace

**AFFIDAVIT UNDER 37 C.F.R. § 1.132
(Revised)**

I, Marty Jay Cox, a citizen of the United States of America residing at 5680 S. Bogey Drive, Polo, Illinois 61064, do hereby declare that:

I am a coinventor of the invention claimed in U.S. Patent Application No. 10/775,746.

Before I conceived of the invention claimed in the patent application, I was employed by Professional Graphics, Inc. as a pre-press and printing broker. I had no prior experience running a business, selling or marketing products or acting as an officer of a company. Christie Marie Cox, coinventor of the invention, was employed as a funeral director and embalmer. Mrs. Cox also had no prior experience running a business, selling or marketing products or acting as an officer of a company.

Mrs. Cox and I realized that the burial receptacle, such as a vault, is a cold and impersonal container into which the deceased is placed. We realized that the burial receptacle lacked continuity with the funeral, which is largely personalized with artifacts and pictures of the deceased and his or her family.

To solve this problem, Mrs. Cox and I conceived of the claimed invention, which in its commercial embodiment takes the unadorned receptacle, such as a burial vault or urn or other respository, and makes it appealing and personalized for each funeral and each deceased. It brings color and life through adornment to that which was once, plain and ordinary.

After we conceived of the claimed invention, Mrs. Cox and I worked from our home to develop the invention and founded our company Legacy Prints, Inc. I am the President of Legacy Prints and Mrs. Cox is the Secretary (co-owner). The company has four (4) employees.

In October 2003, we introduced our invention at the National Funeral Directors Association (NFDA) convention for all funeral directors nationwide. Wilbert Funeral Services, a leading vault manufacturer, deemed it a marketable product and wanted to sell it in the United States and Canada. We have been supplying products embodying our invention to Wilbert. This invention was the only one of its kind at the NFDA convention and we received very promising feedback on the invention.

The product that was originally supplied, continue to be supplied, and whose sales figures are provided below, embody the elements of at least claim 1 in the application (hereinafter, and for the purposes of this declaration only, "the invention", namely:

A carapace for a burial vault having a top surface, and attached to this top surface is a substrate having a decorative graphic; an adhesive interposed between the carapace and the substrate and adhering the substrate to the carapace, where the substrate is formed from a material selected from the group consisting of polyester, polypropylene, polyethylene, vinyl, acetate, acrylic, polystyrene and polycarbonate.

The following table illustrates the increasing gross sales and the increasing market share:

Sales Year	Sales Units	Burial Vault Market Sales	% Market
2003	3,583	1,752,834	0.002044%
2004	5,168	1,657,929	0.003117%
2005	5,748	1,653,129	0.003477%
2006	7,300	1,648,329	0.004429%

Table 1

These market share figures are based on the attached report Exhibit 6, entitled, "Projected vs Actual Death and Cremation Numbers" that was produced by the Cremation Association of North America (CANA) in 2005 ("the CANA Report"), which is the most recent report I was able to locate with such relevant data.

According to CANA's web page (see Exhibit 7):

Founded in 1913, the Cremation Association of North America (CANA) is an International organization of over 1300 members, composed of cemeterians, cremationists, funeral directors, industry suppliers and consultants. CANA members believe that cremation is preparation for memorialization.

The number of burial vaults was determined by subtracting the number of cremations from the number of total deaths, which is an accurate method to estimate the burial vault sales.

Our information on sales units for the year 2007 was lost in a computer-related disk drive accident, and is therefore unavailable for inclusion in Table 1.

The CANA report provides actual cremation numbers for the years 2003 and 2004. Table 1 uses an estimate for based on a linear regression model based on actual values for year 2004, and projected values for 2010 in the CANA Report. Accordingly, the model used was ($y = mx + b$), where (for number of burial vault sales, which is total deaths minus cremations) $m = -4800$ and $b = 11,277,129$. A linear regressions model is a reasonable

model to use in this time frame. The Cana Report and Table 1, in general, show a trend towards more cremations and less use of burial vaults.

Table 1 further shows a steadily increasing market share, despite the declining market for burial vaults.

These increased gross sales as well as increasing percentage of market share occurred despite the entry of competitors into this market.

Although I do not have direct evidence of copying of our invention by competitors (which would be exceptionally difficult for me to obtain under the present circumstances), I find the circumstantial evidence of copying to be compelling. No reasonable person could conclude that the sudden appearance of a rush of competitors producing a product encompassing the elements of the invention is mere coincidence.

Despite the fact that burial vaults have been used back into antiquity, until our introduction in the marketplace of the invention at the NFDA in October 2003, I was unaware of any sales of carapaces that comprised the invention.

One year later, in October 2004, I noticed at the NFDA convention that Doric Vaults had copied our invention and was selling it. Photographs from that convention and the Doric Vaults exhibit are attached hereto as Exhibit 1.

In the February 21, 2005, edition of *Newsweek*, our invention was covered in the Periscope section. *Newsweek* noted that, "Customizing burial vaults...has become a popular way to pay tribute...." A copy of the article is attached hereto as Exhibit 2. Ray Simon is an artist that create the artist design for the prints used in connection with the products we supply to Wilbert Funeral Services.

In October 2005, I noticed at the NFDA convention that Doric Vaults was still selling copies of our invention (see Exhibit 3). In addition, another company, Trigard, had started selling copies of our invention. Attached as Exhibit 4 is a copy of a recent Trigard website page indicating that they are now selling the invention as well. We have since learned that even monument companies are copying our invention.

The November 26, 2004 edition of the *Omaha World-Herald* noted in "Burial Vault Artwork Adds Personal Touch" that the invention was a "relatively new practice in the funeral industry" but that "most vault makers now offer the option." A copy of the article is attached hereto as Exhibit 5. This article, too, mentions that Ray Simon is the artist that designs the prints used on the products we supply to Wilbert Funeral Services. Exhibit 5.


In October 2006, Wilbert Funeral Services made the invention a "standard offering" on their vaults. This means that, within the next two years, every Wilbert distributor will be required to offer a selection of vaults that include the invention. In addition, Wilbert has changed the design of its lowering mechanisms so that the mourners can better see at the graveside the personalization of burial receptacles such as vaults.

The fact that our competitors (see, e.g., Exhibit 4) are advertizing the features claimed in our invention (topside decorative appliqué for the burial vault) strongly suggests that the

commercial success flows from the functions and advantages as disclosed in the specification and is derived from the claimed invention.

The tremendous commercial success of our product can be seen by the substantially increasing units sold over the years along with a greater market share, the copying of our product as time went on, Wilbert making the invention a standard offering and the changing, by Wilbert, of its design for lowering mechanisms to better accommodate the invention.

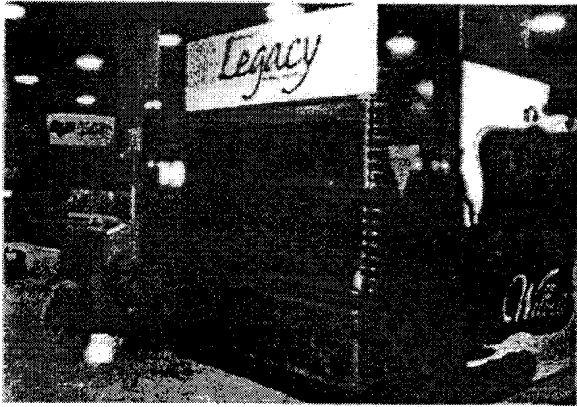
I hereby declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under section 1001 of Title 18 of the United States Code and that such willful false statements may jeopardize the validity of the application or any patent issued thereon.

Marty Jay Cox	Date: <u>7-7-08</u> 
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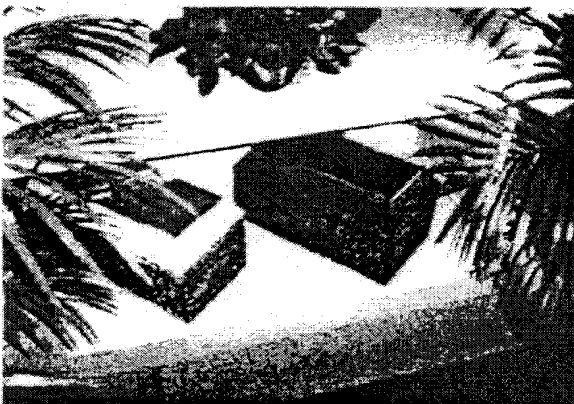
2004 NFDA

Exhibit 1

Legacy



Competitors



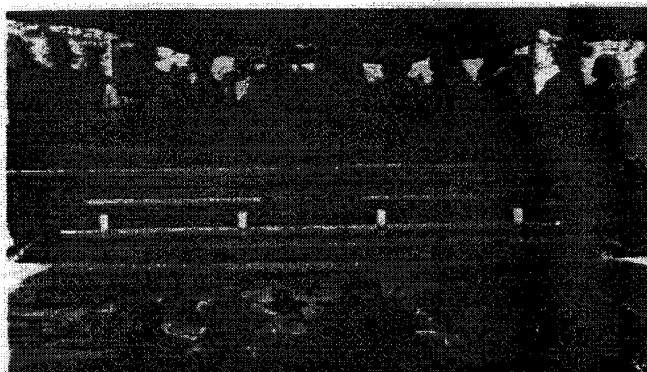
Periscope

VAULT ART

The View From the Beyond

MARINE CPL. SHANE Kielion, 23, died Nov. 15—hours after his wife gave birth to their first son. At a graveside service in Omaha, Neb., nine days later, mourners gathered around Kielion's burial vault to admire images adorning the lid: the statue of Saddam Hussein toppling, tanks storming the desert, an Iraqi girl waving an American flag.

Customizing burial vaults, the boxes that protect a casket after interment, has become a popular way to pay tribute to fallen veterans. Ray Simon of



STYLISH DEPARTURES: Decorated burial vaults capture the memories

Youngstown, Ohio, began designing images two years ago and has since completed more than 500 orders. "Memorials are no longer just for presidents. They are being presented to your hometown heroes," says Simon, whose paintings honor vets of WWII, Korea, Vietnam and Iraq, and firefighters and police who lost

their lives on 9/11. The original paintings are made into prints, affixed to a thin layer of transparent vinyl and attached to the vaults. Because the images are buried along with the deceased, Simon sends families 16-by-20-inch replicas. Good thing. Roger Kielion, Shane's father, says, "It's a shame they had to cover it up." —WILLIAM LEE ADAMS

SURGERY

A Taxing Procedure

TAXING BREAST IMplants is the latest tool states are using to augment their revenues. New Jersey pioneered the idea in September, when it became the first state to levy a 6 percent tax on elective cosmetic procedures, such as liposuction and face-lifts. Now similar taxes are up for debate in Washington and Illinois, and other states are said to be considering cosmetic-surgery tax legislation.

Botox and breast implants make an easy target for cash-



FACE-OFF: States want new taxes

strapped states like Washington, which faces a deficit of roughly \$2 billion. After all, the American Society of Plastic Surgeons reports that in 2003, Americans spent \$8.4 billion on cosmetic procedures. Doctors and medical groups oppose the taxes, saying they discriminate against women, who made up 86 percent of those getting procedures in 2003. But Washington state Sen. Karen Keiser, who notes that revenues from her state's tax would go to health services for children, says it might even give the industry a lift. "[It's] a little incentive to get something done," she says. It's for the kids, after all. —KAREN SPRINGER

SKIERS Cross-Country Crosses Over

When does a sport officially go "mainstream"? One sign: when parents are frightened by their kids' participation. "He hasn't hurt himself yet," says David Howell about Andrew, his son. "I've got my fingers crossed." David does have some reason to worry, even though Andrew is a star in the world of extreme cross-country skiing. Inspired by the acrobatics of snowboarders and sliders, young Nordic skiers are taking to the air themselves. In Nordic races, popular in Europe, competitors start on a mass and fly down a winding course. Races are full-contact. "We're trying to remake the image of cross-country," says Colin Bell, organizer of North America's first big "Nordic skiercross" event, in Calgary on April 2. He's not the only one: In the past five years, at least 15 U.S. cross-country ski-touring centers have built terrain parks.



NO SLUMP AT THIS SLOPE (Clockwise from top left) Skiers in action

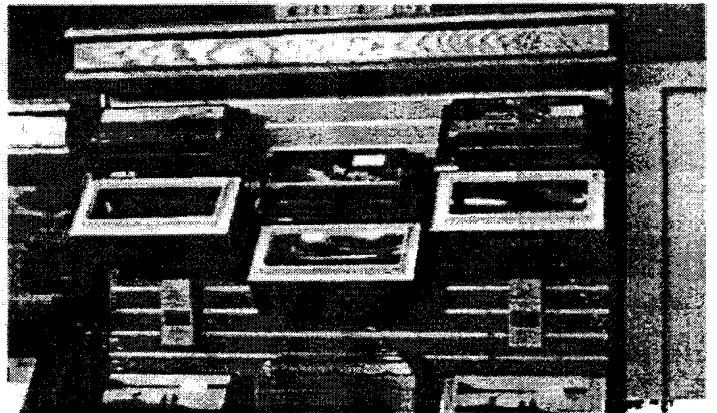
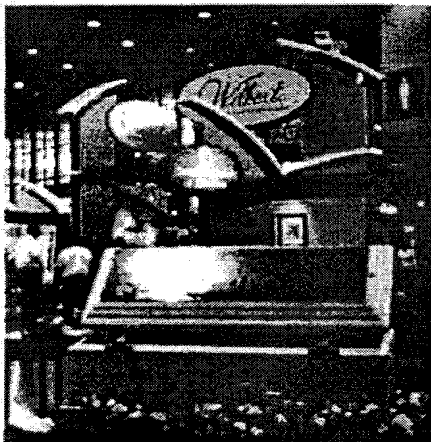
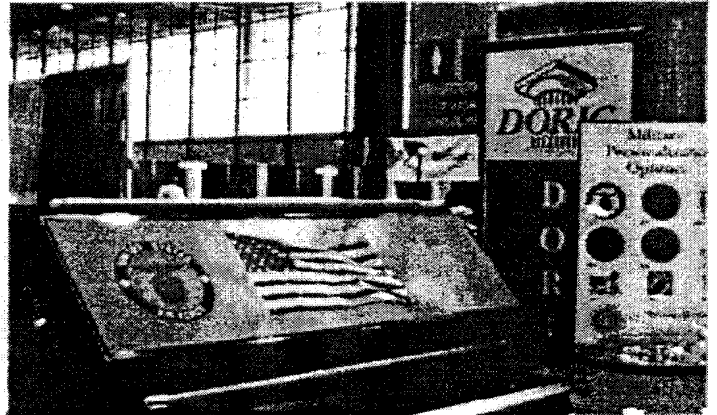
2005 NFDA

Exhibit 3

Legacy



Competitors





FUNERAL PRODUCTS & SUPPLIES

SERVING THE FUNERAL INDUSTRY

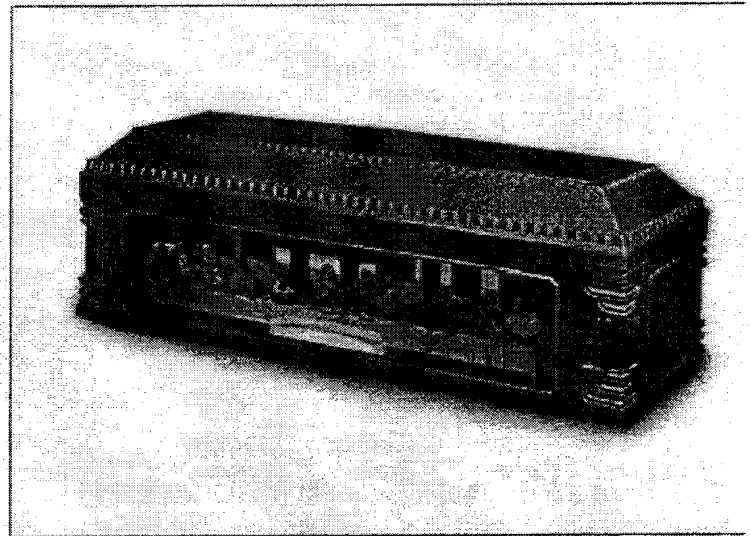
[RETURN TO PRODUCT MENU](#)

Appliqué

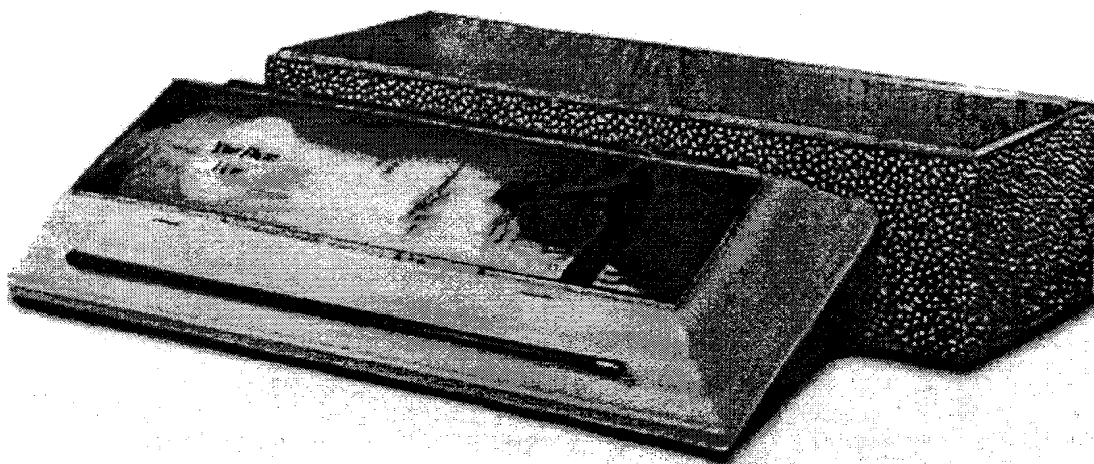
Aegean Side Appliqués and New Topside Appliqués!

Aegean Appliqués

Along with our new library of high-quality Aegean appliqués, Trigard presents a new appliqué that can be placed on the top carapace of a Tremont or our metal lined vaults. Just like our unique Aegean side appliqués, we can personalize the topside appliqué with any number of stock scenes, personalized photographs, name or date. The adhesive topside appliqué is easy to apply and is yet another way that Trigard allows you to personalize your vault. From sports, landscapes, hobbies, military and religious scenes, the possibilities are endless.



Topside Appliques



Library of Appliqués

We are constantly updating our library of appliques, so if you do not find what you are looking for in this list, please email or call our customer service representatives. Keep in mind that some categories have several different appliques to choose from, and we would be happy to email you a proof before we print your appliqué. Personalization is available, and the possibilities are limited only by your imagination.

Hobbies
Airplanes
Art
Baking
Boating
Cards
Coffee
Flag
Crochet
Crossword
Doctor
Fishing
Flute
Gardening
Harley
Horses
Hot Air Balloons
John Deere
Knitting
Motorcycle
Patchwork
Piano
Railroad
Scrapbooking
Sewing
Sheet Music
Skydiving
Surfing
Theater
Trains
Violin

Religious
Angels
Bible
Candles
Crosses
Crucifix
Dove
Jesus on Cross
Last Supper
Mary & Jesus
Praying Hands
Star of David

Sports
Baseball
Billiards
Bowling
Busch Stadium
Cycling
Fenway Park
Football
Golf
NASCAR
Poker
Running
Waterskiing

Landscape/Nature
Barn
Beach
Boats
Bridge
Castle
Clouds
Covered Bridge
Dolphins
Ducks
Fall Trees
Farmland
Field
Fish
Flowers
Green Pasture
Hay Rolls
Heart Shaped Cloud
Hummingbird
Lakeside bench
Lighthouse
Mountains
Ocean
Rainbow
Sea Turtle
Spain
Sunset
Swan
Waterfall
Wooded Road

Patriotic
Blue Angels
Camouflage
Dog Tags
Eagle
Fireworks
American Flag
Statue of Lib.
Salute



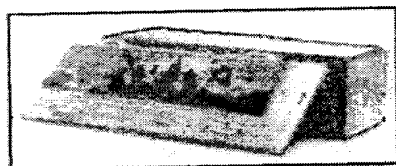
Published Friday
November 28, 2004

Burial vault artwork adds personal touch

BY KRISTIN ZAGURSKI

WORLD-HERALD STAFF WRITER

An Iraqi girl waves an American flag. A U.S. tank topples a statue of Saddam Hussein. Soldiers march and tanks roll by as planes whiz overhead.



A photo from the manufacturer shows a print like the one placed on Marine Cpl. Shane Kielion's burial vault.

After Marine Cpl. Shane Kielion's graveside services Wednesday at St. John Cemetery in Bellevue, Kielion's mother, Pat, stepped forward to look more closely at the vivid scenes.

She was followed by other mourners who wanted to see the lid to Kielion's metal burial vault. It had been covered with a colorful print depicting images of the war in Iraq. Written on the lid were Kielion's name, unit and years of birth and death.

The burial vault for Army 1st Lt. Edward Iwan of Albion, Neb., who was buried Monday and like Kielion was killed in the fighting in Fallujah, Iraq, also was decorated. In

Iwan's case, the vault had an emblem of a saluting soldier.

Customizing the lids to burial vaults is a relatively new practice in the funeral industry, but it seems to have caught on with the families of war veterans, as well as firefighters and police officers.

An American flag covered the lid of Omaha Police Sgt. Jason Tye Pratt's vault. Pratt was killed in the line of duty in September 2003.

Since a burial vault holds the casket, the images are seen for only a short time at the cemetery. Still, families see this as another way to personalize memorial services, and those in the industry say most vault makers now offer the option.

"All of the companies are very well aware of what's going on overseas and are trying to make those tributes as personal as possible," said David Walkinshaw, a spokesman for the Brookfield, Wis.-based National Funeral Directors Association.

Artist Ray Simon of Youngstown, Ohio, designed the print on Kielion's vault for Wilbert Funeral Services Inc. The local office for the company, Omaha Wilbert Vaults Inc., donated the print, though not the vault. It also supplied Pratt's vault.

The Broadview, Ill., company has prints commemorating veterans of World War II, the Korean and Vietnam Wars and the New York City rescue teams from the Sept. 11, 2001, terrorist attacks. It also has nonmilitary images that include a country road, a snow-covered bridge and mountains.

The artwork is applied to a clear sheet of vinyl, which is affixed to the lid.

The vividness of the artwork and the detail of the letters make it look as if the image is painted on the lid and the letters engraved, said Kelly Nobiling, vice president with Wilbert Vaults.

"It's personalizing it for the family," she said. "It's making it special."

Contact the Omaha World-Herald newsroom

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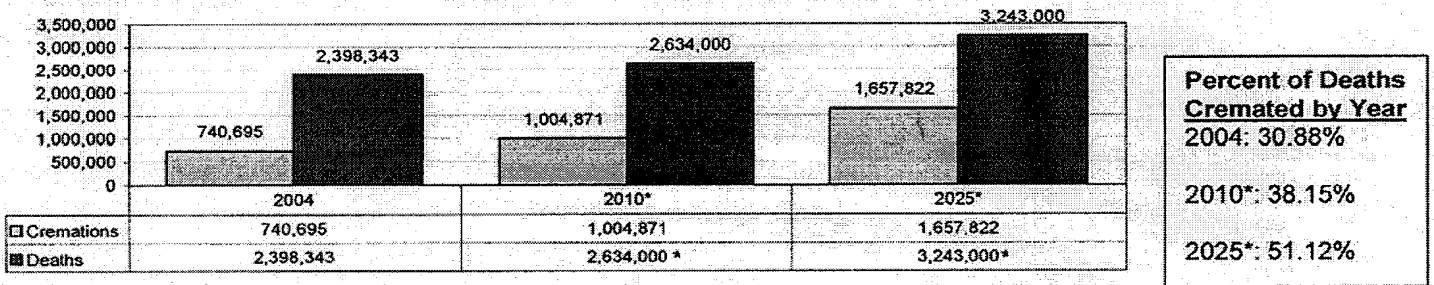
http://www.omaha.com/toolbox/story_printer.php?u_id=1268934&u_brow=Internet+Exp... 11/26/2004

Exhibit 6

Projected vs. Actual Death and Cremation Numbers

The graph below shows a comparison of the number of deaths and cremations for the years 2004, *2010 and *2025. The 2004 death rate is extracted from the National Vital Statistics System. The 2010 and 2025 death rates were extracted from the US Department of Commerce, Bureau of the Census' *Projections of the Population of the United States by Age, Sex and Race: 1988 to 2080, Series P-25, No. 1018*.

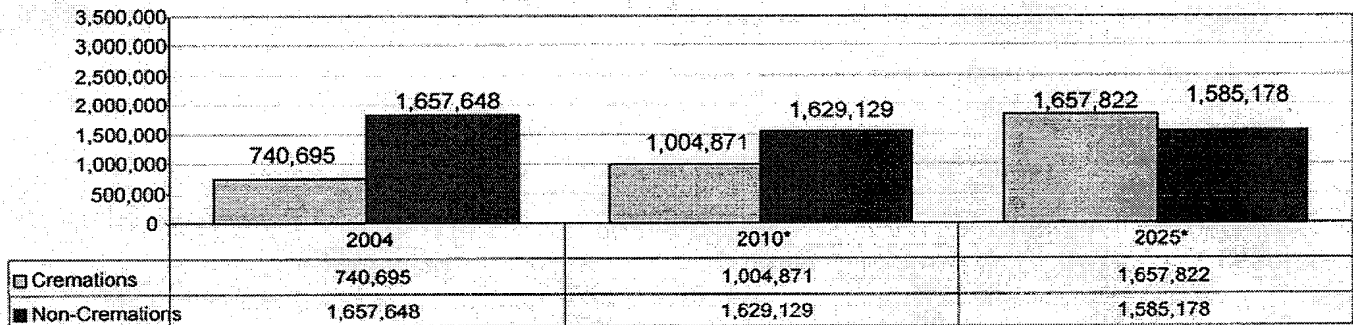
Deaths and Cremations Projected - United States Only



*Projected figures.

Disposition Figures: Cremations vs. Non-Cremations

Cremations and Non-Cremations Projected - United States Only



Total Deaths	2,398,343	2,634,000*	3,243,000*
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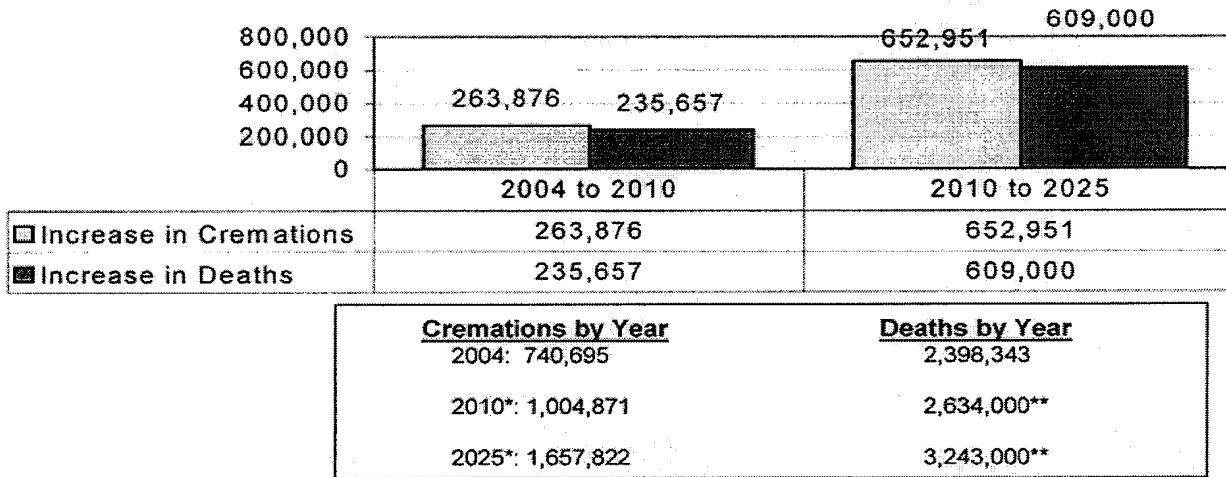
*Projected figures.

Exhibit 6

• Comparison of Projected Cremations and Deaths

Interestingly, the increase in the rate of cremations in the United States exceeds the increase in deaths when comparing 2004 actual rates to 2010 projected rates (see graph below). For example, CANA predicts that there will be an increase of approximately 263,876 more cremations, but only 235,657 more deaths in 2010 than there were in 2004. This indicates that not only will the number of cremations performed in seven years increase because of the increasing number of deaths, but the number will be even greater because the percentage being cremated is increasing as well.

Projected Increase of Cremations and Deaths- United States Only



*Projected figures.

**US Department of Commerce, Bureau of the Census' Projections of the Population of the United States by Age, Sex and Race: 1988 to 2080, Series P-25, No. 1018.

CANA's Projections versus Actual Death to Cremation Comparisons

Year	% of U.S. Cremations to Deaths			# of U.S. Cremations (in thousands)		
	Projected	Actual	Difference	Projected	Actual	Difference
1987	14.9%	15.2%	+0.3%	NA	NA	NA
1988	15.7%	15.3%	-0.4%	NA	NA	NA
1989	16.2%	16.4%	+0.2%	NA	NA	NA
1990	16.9%	17.0%	+0.1%	NA	NA	NA
1991	17.47%	18.50%	+1.03%	NA	NA	NA
1992	18.89%	19.11%	+0.22%	NA	NA	NA
1993	20.16%	19.78%	-0.38%	438.5	448.5	+10.0
1994	20.79%	20.60%	-0.19%	469.2	471.0	+1.8
1995	21.49%	21.14%	-0.35%	496.8	488.3	-8.5
1996	21.78%	21.31%	-0.47%	514.1	492.4	-21.7
1997	22.04%	23.13%	+1.09%	520.9	533.8	+12.9
1998	23.75%	24.10%	+0.35%	553.4	563.4	+10.0
1999	25.39%	25.04%	-0.35%	595.6	598.7	+3.1
2000	25.56%	26.11%	+0.55%	605.1	627.7	+22.6
2001	27.25%	26.93%	-0.32%	651.2	650.7	-0.5
2002	27.78%	27.75%	-0.03%	677.7	678.1	+0.4
2003	28.63%	28.41%	-0.22%	693.7	695.6	+1.9
2004	29.61%	30.88%	+1.27%	708.7	740.7	+32.0

Exhibit 7



Site Search

Go

Top



Who is CANA?

Founded in 1913, the Cremation Association of North America (CANA) is an International organization of over 1300 members, composed of cemeterians, cremationists, funeral directors, industry suppliers and consultants. CANA members believe that cremation is preparation for memorialization.

The Cremation Association of North America was originally formed to promote the "modern way" and the "safe and hygienic way" of dealing with a dead human body. It was a form of disposition and had nothing to do with the funeral and memorialization of the deceased.

At that time, and up into the early 1920's, cremation was the choice of the wealthy and the well-educated. All crematories were located on cemetery property and elaborate columbariums were built for the elaborate urns then being used.

After it became apparent, through scientific investigation, that proper in-ground, full body burial was safe, cremation fell out of favor and remained in the 3 % to 5% range. It wasn't until the early 1980's that the rate reached double digits and started to increase on the average of about 8% annually.

In 1985 CANA, which had been monitoring the annual national and state cremation rates, projected the cremation rate for the year 2000 would be a little over 25%.

This prediction made a real impact in the death care profession because that projected to over 600,000 cremations in 2000 compared to fewer than 300,000 in 1985.

CANA's projection was actually a little under the actual cremation percentage for 2000 as the rate was 26.19% with 629 ,362 cremations. Since 2000, CANA has projected the cremation rate to 2010 and 2025, which based on current confirmed figures of 2004 (30.88%) and preliminary 2005 figures (31.99%), stand at 35.07% for 2010 and 51.12% for 2025, which equates to nearly 1,657,822 United States cremations in 2025.

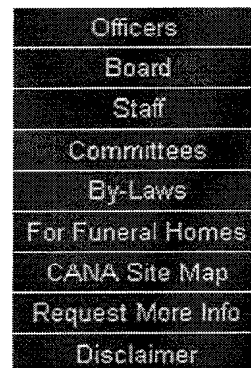
A CANA survey done in 1998 showed that 26% of those cremated were Catholic, and recent survey results from other groups now put that figure at 30%, which would mean that approximately 420,000 Catholic cremations would occur in 2025, with over 200,000 Catholics being cremated in 2003.

- CANA members have recognized this steady growth of cremation and have been active in promoting the importance of memorialization when cremation is chosen.
- CANA is not a 'pro-cremation over burial' association, but is concerned with the proper treatment and respect for those who have chosen cremation and that cremation is preparation for memorialization.

CANA Code of Cremation Practice

In the practice of cremation, we believe:

- In dignity and respect in the care of the deceased, in compassion for the living who survive them, and in the memorialization of life;
- That a Cremation Authority should be responsible for creating and maintaining an atmosphere of respect at all times;
- That the greatest care should be taken in the appointment of crematory staff members, any of whom must not, by conduct or demeanor, bring the crematory or cremation into disrepute;
- That cremation should be considered as preparation for memorialization;
- That the dead of our society should be memorialized through a commemorative means suitable to the survivors.



Translate:



Exhibit 7

CANA also feels that the word "cremains" should not be used when referring to "human cremated remains" as "cremains" has no real connection with the deceased whereas a loved one's "cremated remains" has a human connection.

During their annual convention and trade show in August, 2004, the International Cremation Federation met with CANA for the first time to discuss the topic of cremation.

A membership in CANA is the best way for any cemeterian or funeral director to stay abreast of what is going on in cremation and how to deal with an aging population that is choosing cremation in greater and greater numbers.



[\[Home\]](#) [\[About CANA\]](#) [\[Membership\]](#) [\[Publications\]](#) [\[Statistics\]](#) [\[For Consumers\]](#) [\[CANA Showcase\]](#)

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Reply Brief on Appeal Under 37 C.F.R. §
41.41
In re Appl. No. 10/775,746

PATENT
Attorney Docket No. P2702US

APPENDIX B – ATTACHMENT 2

**UNSIGNED DECLARATION/AFFIDAVIT UNDER 37 C.F.R. § 1.132
WITH NUMBERED PARAGRAPHS**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

APPLICANT(S):	Cox et al.	DOCKET NO:	P2702US
SERIAL NO.:	10/775,746	ART UNIT:	3677
FILED:	February 10, 2004	EXAMINER:	William L. Miller
CONF. NO.:	1553		
TITLE: Method for Customizing a Burial Vault Carapace			

**AFFIDAVIT UNDER 37 C.F.R. § 1.132
(Revised)**

I, Marty Jay Cox, a citizen of the United States of America residing at 5680 S. Bogey Drive, Polo, Illinois 61064, do hereby declare that:

1. I am a coinventor of the invention claimed in U.S. Patent Application No. 10/775,746.
2. Before I conceived of the invention claimed in the patent application, I was employed by Professional Graphics, Inc. as a pre-press and printing broker. I had no prior experience running a business, selling or marketing products or acting as an officer of a company. Christie Marie Cox, coinventor of the invention, was employed as a funeral director and embalmer. Mrs. Cox also had no prior experience running a business, selling or marketing products or acting as an officer of a company.
3. Mrs. Cox and I realized that the burial receptacle, such as a vault, is a cold and impersonal container into which the deceased is placed. We realized that the burial receptacle lacked continuity with the funeral, which is largely personalized with artifacts and pictures of the deceased and his or her family.
4. To solve this problem, Mrs. Cox and I conceived of the claimed invention, which in its commercial embodiment takes the unadorned receptacle, such as a burial vault or urn or other respository, and makes it appealing and personalized for each funeral and each deceased. It brings color and life through adornment to that which was once, plain and ordinary.
5. After we conceived of the claimed invention, Mrs. Cox and I worked from our home to develop the invention and founded our company Legacy Prints, Inc. I am the President of Legacy Prints and Mrs. Cox is the Secretary (co-owner). The company has four (4) employees.
6. In October 2003, we introduced our invention at the National Funeral Directors Association (NFDA) convention for all funeral directors nationwide. Wilbert Funeral Services, a leading vault manufacturer, deemed it a marketable product and wanted to sell it in the United States and Canada. We have been supplying products embodying our invention to Wilbert. This invention was the only one of its kind at the NFDA convention and we received very promising feedback on the invention.
7. The product that was originally supplied, continue to be supplied, and whose sales figures are provided below, embody the elements of at least claim 1 in the application (hereinafter, and for the purposes of this declaration only, "the invention", namely:

A carapace for a burial vault having a top surface, and attached to this top surface is a substrate having a decorative graphic; an adhesive interposed between the carapace and the substrate and adhering the substrate to the carapace, where the substrate is formed from a material selected from the group consisting of polyester, polypropylene, polyethylene, vinyl, acetate, acrylic, polystyrene and polycarbonate.

8. The following table illustrates the increasing gross sales and the increasing market share:

Sales Year	Sales Units	Burial Vault Market Sales	% Market
2003	3,583	1,752,834	0.002044%
2004	5,168	1,657,929	0.003117%
2005	5,748	1,653,129	0.003477%
2006	7,300	1,648,329	0.004429%

Table 1

9. These market share figures are based on the attached report Exhibit 6, entitled, “Projected vs Actual Death and Cremation Numbers” that was produced by the Cremation Association of North America (CANA) in 2005 (“the CANA Report”), which is the most recent report I was able to locate with such relevant data.

10. According to CANA’s web page (see Exhibit 7):

Founded in 1913, the Cremation Association of North America (CANA) is an International organization of over 1300 members, composed of cemeteryans, cremationists, funeral directors, industry suppliers and consultants. CANA members believe that cremation is preparation for memorialization.

11. The number of burial vaults was determined by subtracting the number of cremations from the number of total deaths, which is an accurate method to estimate the burial vault sales.

12. Our information on sales units for the year 2007 was lost in a computer-related disk drive accident, and is therefore unavailable for inclusion in Table 1.

13. The CANA report provides actual cremation numbers for the years 2003 and 2004. Table 1 uses an estimate for based on a linear regression model based on actual values for year 2004, and projected values for 2010 in the CANA Report. Accordingly, the model used was ($y = mx + b$), where (for number of burial vault sales, which is total deaths minus cremations) $m = -4800$ and $b = 11,277,129$. A linear regressions model is a reasonable model to use in this time frame. The Cana Report and Table 1, in general, show a trend towards more cremations and less use of burial vaults.

14. Table 1 further shows a steadily increasing market share, despite the declining market for burial vaults.

15. These increased gross sales as well as increasing percentage of market share occurred despite the entry of competitors into this market.
16. Although I do not have direct evidence of copying of our invention by competitors (which would be exceptionally difficult for me to obtain under the present circumstances), I find the circumstantial evidence of copying to be compelling. No reasonable person could conclude that the sudden appearance of a rush of competitors producing a product encompassing the elements of the invention is mere coincidence.
17. Despite the fact that burial valuts have been used back into antiquity, until our introduction in the marketplace of the invention at the NFDA in October 2003, I was unaware of any sales of carapaces that comprised the invention.
18. One year later, in October 2004, I noticed at the NFDA convention that Doric Vaults had copied our invention and was selling it. Photographs from that convention and the Doric Valuts exhibit are attached hereto as Exhibit 1.
19. In the February 21, 2005, edition of *Newsweek*, our invention was covered in the Periscope section. *Newsweek* noted that, "Customizing burial vaults...has become a popular way to pay tribute...." A copy of the article is attached hereto as Exhibit 2. Ray Simon is an artist that create the artist design for the prints used in connection with the products we supply to Wilbert Funeral Services.
20. In October 2005, I noticed at the NFDA convention that Doric Vaults was still selling copies of our invention (see Exhibit 3). In addition, another company, Trigard, had started selling copies of our invention. Attached as Exhibit 4 is a copy of a recent Trigard website page indicating that they are now selling the invention as well. We have since learned that even monument companies are copying our invention.
21. The November 26, 2004 edition of the *Omaha World-Herald* noted in "Burial Vault Artwork Adds Personal Touch" that the invention was a "relatively new practice in the funeral industry" but that "most vault makers now offer the option." A copy of the article is attached hereto as Exhibit 5. This article, too, mentions that Ray Simon is the artist that designs the prints used on the products we supply to Wilbert Funeral Services. Exhibit 5.
22. In October 2006, Wilbert Funeral Services made the invention a "standard offering" on their vaults. This means that, within the next two years, every Wilbert distributor will be required to offer a selection of vaults the include the invention. In addition, Wilbert has changed the design of its lowering mechanisms so that the mourners can better see at the graveside the personalization of burial receptacles such as vaults.
23. The fact that our competitors (see, e.g., Exhibit 4) are advertizing the features claimed in our invention (topside decorative appliqué for the burial vault) strongly suggests that the commercial success flows from the functions and advantages as disclosed in the specification and is derived from the claimed invention.
24. The tremendous commercial success of our product can be seen by the substantially increasing units sold over the years along with a greater market share, the copying of our product as time went on, Wilbert making the invention a standard offering and the

changing, by Wilbert, of its design for lowering mechanisms to better accommodate the invention.

I hereby declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under section 1001 of Title 18 of the United States Code and that such willful false statements may jeopardize the validity of the application or any patent issued thereon.

Marty Jay Cox

Date: _____

CH01/ 12496900.5

Reply Brief on Appeal Under 37 C.F.R. §
41.41
In re Appl. No. 10/775,746

PATENT
Attorney Docket No. P2702US

APPENDIX C
RELATED PROCEEDINGS APPENDIX

There are no related proceedings associated with this appeal.

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